



NORTH CAROLINA LAW REVIEW

Volume 68 | Number 5

Article 1

6-1-1990

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John D. Arras

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Recommended Citation

John D. Arras, *Nancy Rhoden: Exploring the Dark Side of Biomedical Technology*, 68 N.C. L. REV. 835 (1990).

Available at: <http://scholarship.law.unc.edu/nclr/vol68/iss5/1>

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NANCY RHODEN: EXPLORING THE DARK SIDE OF BIOMEDICAL TECHNOLOGY

JOHN D. ARRAS[†]

Like an awesome, cascading fireworks display, Nancy Rhoden's scholarly career began as a gentle, rising arc that suddenly exploded into a shower of dazzling flashes, each one more brilliant and breathtaking than the last. Then silence and darkness. The difference, however, is that while personal tragedy has taken Nancy from us, her light still shines and her writing continues to illuminate.

Working in the interdisciplinary field of biomedical ethics, at home as much in philosophy and medicine as in law, Nancy never permitted herself the luxuries of narrow specialization and arcane pursuits. She went straight for the big questions confronting us as a society and as individuals: Should the imperiled newborn or dying elderly be sustained indefinitely on high-technology medicine? Who should decide and according to which standards and values? What are the implications of biomedical technology for the ethics and law of abortion? Should women be forced to submit to medical treatment for the sake of their fetuses?

In attempting to come to terms with her substantial corpus, it must be noted at the outset that whatever answers Nancy Rhoden eventually worked out for these extraordinarily difficult questions, there was nothing pat or formulaic about her approach to them. In stark contrast to the reductionist mentality that would pave over the rough edges of the moral life to make the world safe for a single principle or ideology, Nancy attempted to grapple with moral/legal problems in all their baffling complexity and ambiguity. I vividly recall many a midnight "conceptual crisis" call from Nancy, pacing and fretting on the other end of the line, wondering aloud how she ever got herself into this mess and how she would ever manage to take a stand. All her work was saturated with what Sartre had called this "salutary anxiety."

While it has become something of a monumental platitude to assert that bioethics addresses the ethical problems posed by modern technology, Nancy Rhoden did so in an altogether penetrating and original fashion. Indeed, it is not too much of a simplification to sum up Nancy's work as a sustained critique of the technological imperative that governs medicine and derives subsequent legitimation from law. Beneath the surface arguments dealing with each specific biomedical controversy, Nancy could be heard asking, "How are we going to live with this technology? Can we temper it through the assertion of humane

[†] Associate Professor of Bioethics, Albert Einstein College of Medicine-Montefiore Medical Center, Bronx, New York; B.A., University of San Francisco; Ph.D., Philosophy, Northwestern University.

values or must everything, including our very dignity and autonomy, be sacrificed up to it?"

No mere exercise in rhetorical hand waving, these questions engendered a coherent and extraordinarily fruitful research program, with each new article opening up wider vistas for further exploration. Between 1984 and 1989 Nancy wrote six brilliantly conceived, trenchantly argued, and comprehensively researched law review articles—the last of which appears in this issue—and more than a score of book chapters and occasional pieces for biomedical journals. It was, by any standard, a prodigious cascade of exemplary scholarship.

Nancy Rhoden left her distinctive mark upon every topic she addressed. Her first "major" article,¹ on the problem of imperiled newborns, argued persuasively for the necessity of curbing the imperatives of high technology neonatal care with responsible quality-of-life judgments—and for a suitably wide ambit of familial decision-making—at a time when our Federal government, through its so-called "Baby Doe Regulations," was busy stripping parents of their rightful authority and branding conscientious pediatricians as "child abusers."

Both of Nancy's articles on abortion² ingeniously grappled with the problem of technological advance and legal lag. In a highly influential essay published in the *Yale Law Journal*, Nancy pondered the implications for abortion rights of obstetrical and neonatal technologies that had, according to Justice O'Connor, placed the Court's trimester system "on a collision course with itself." By making a woman's right to choose abortion contingent, via its notion of "viability," upon the current state of medical technology, the *Roe* court had set the stage for the continuing technological domination of law and widely held social values. The solution, powerfully argued by Nancy Rhoden, was to perceive the moral irrelevance of technologically based definitions of viability and to replace them with a more commonsensical, legally defined concept corresponding to "late term" in gestation.

In *The Judge in the Delivery Room*³ Nancy helped frame the emerging public debate over forced cesarean sections and other medical impositions on unwilling women. While agonizing over the tragic conflict between maternal autonomy and fetal health posed by this controversy, and while reasserting women's ethical responsibilities to their own soon-to-be-born children, Nancy thoughtfully deployed a rights-based framework to argue for the conclusion that the state has no moral or legal right to *force* women to submit their bodies to serious medical risks for the sake of others.

The fullness of Nancy Rhoden's intellectual powers and growing scholarly

1. Rhoden, *Treatment Dilemmas for Imperiled Newborns: Why Quality of Life Counts*, 58 S. CAL. L. REV. 1283 (1985). Prior to the publication of this widely noted article, Nancy Rhoden had already published two important law review essays. See Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory*, 31 EMORY L.J. 375 (1982); Rhoden, *The Right to Refuse Psychotropic Drugs*, 15 HARV. C.R.-C.L. L. REV. 363 (1980).

2. Rhoden, *The New Neonatal Dilemma: Live Births from Late Abortions*, 72 GEO. L.J. 1451 (1986); Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L.J. 639 (1986).

3. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CAL. L. REV. 1951 (1986).

maturity can be glimpsed in her final, and I think most powerful, articles devoted to the vexing problem of proxy decision making for incompetent adults. In her magisterial *Harvard Law Review* article, *Litigating Life and Death*,⁴ Nancy deftly exposed the inadequacies of the regnant "subjective" and "objective" tests for forgoing life-sustaining treatments, concluding that a different approach was required, one that would give family members discretion to decide in the "gray area" of ethical ambiguity. While most of us were dimly aware of the correctness of this position, Nancy's brilliant procedural suggestion—that the burden of proof should rest with physicians rather than the family—had the effect of dropping the scales from our eyes, of *showing us* in effect how to give human beings the upper hand over a seemingly implacable medical and legal imperative.

Although other scholars in her field wrote with comparable jurisprudential insight and authority, Nancy Rhoden's essays are distinctive for their philosophical depth and encyclopedic grasp of complex medical realities. Acutely aware of the limits of legal analysis, Nancy invariably gravitated toward the deeper philosophical and social dimensions of problems that conventional legal discourse tends to ignore and obscure. An honors philosophy graduate from Oberlin College and a former student of Ronald Dworkin, Nancy was arguably more comfortable pondering the philosophical problems of objectivity and subjectivity, of consequentialism and respect for individual rights, than she was teaching torts.

Nancy Rhoden's philosophical acumen was balanced by an equally rare fascination with the practical, day-to-day realities of the medical world that she so carefully scrutinized. Never content to engage in armchair legal/ethical analysis, Nancy always wrote on the basis of thoroughgoing familiarity with the relevant medical context, often gained through visiting professorships at medical schools or prolonged interviews in clinical settings.

In addition to giving her legal and ethical analyses the ring of authenticity, Nancy's remarkable knowledge of medicine made possible what was arguably her greatest contribution to legal bioethics: the mapping of distinctive, yet previously unthematized, modes of medical thinking about ethical problems. Her articles on imperiled newborns⁵ revealed three distinct strategies, corresponding to the practices of physicians in three different countries, for coping with medical uncertainty. Her research on "the real world of interventionist obstetrics"⁶ laid bare the workings of a "maximin" strategy for avoiding medical or legal risk, often at the expense of women's autonomy. And finally, Nancy's study of proxy decision making shows how the context of our legal and ethical battles is shaped by an ethos of medical interventionism, itself the result of physicians' training, their faith in their own power and fear of litigation, and by the ability of new technologies to effectively "reprogram" their environments to suit the

4. Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375 (1988).

5. See *Treating Baby Doe: The Ethics of Uncertainty*, 16 HASTINGS CENTER REPORT 34 (1986).

6. See Rhoden, *supra* note 2; Rhoden, *Informed Consent in Obstetrics: Some Special Problems*, 9 W.N.E.L. REV. 67 (1987).

conditions of their own deployment—again usually at the expense of patients' and families' autonomy.

By showing us how and why doctors think the way they do, Nancy Rhoden put us in a better position from which to question the standards of value and rationality invoked by physicians and by the courts that reinforce their world-view. By engaging in this very critique, we might hope to continue her work of developing a more humane and responsive medicine, a medicine in the service of free women and men.